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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 764

L. I. COMBS & SONS, INC., L. I. COMBS, JR., AND VILLAGE SHOPPING CENTER, INC., AN INDIANA CORPORATION,

Petitioners,

vs.

PAUL M. SCHREIBMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JUSTIN WAITKUS,
569 Broadway,
Gary, Indiana,
Attorney for Petitioners.

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Petitioners,

vs.

PAUL M. SCHREIBMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners respectfully petition this Honorable Court to Grant the Writ of Certiorari to review the decision and order of the United States Court of Appeals for the Seventh Circuit in the above case. In this behalf, Petitioners show unto the Court:

OPINION BELOW.

The judgment and opinion of the United States District Court for the Northern District of Indiana, Hammond Division, was entered November 12, 1963, and is not reported but is printed in the record filed with the Clerk of the

Court of Appeals below (App. 84-94) and shown in the Appendix to this Petition (App. A).

The opinion of the United States Court of Appeals for the Seventh Circuit reversing the judgment was filed October 14, 1964, and is not yet reported but is set forth in the Appendix hereto (App. B). A petition for rehearing filed in apt time was denied on November 18, 1964 (App. C).

JURISDICTION.

Date of decision and order to be reviewed was entered October 14, 1964 (App. B). The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254(1) (App. D).

QUESTION PRESENTED.

Should a non-resident broker unlicensed at the time he performed services and unlicensed at the time he entered into a Listing Contract be permitted to recover a commission under said Listing Contract because he subsequently obtained a license?

STATUTES INVOLVED.

Statutes involved are Chapter 44 of the Indiana State Acts of 1949, also found in Burns Indiana Statutes—1961 Replacement Vol. 11, Part 2, Sections 63-2401 to 63-2423, inclusive.

STATEMENT OF FACTS.

The Indiana Real Estate Licensing Act invoked in 1949 (Chapter 44 of the Indiana State Acts of 1949 and Burns Statutes, Secs. 63-2401 to 63-2423) is entitled "An Act Regulating Real Estate Brokers and Real Estate Salesmen and Prescribing Penalties for the Violation Thereof."

The Respondent, Paul M. Schreibman, a non-resident real estate broker and one of the Petitioners, L. I. Combs,

Jr., started negotiations for the sale of a shopping center owned by these Petitioners (App. 28). The Petitioners were owners of a shopping center in Gary, Indiana, and in April of 1959, negotiations were started between the Respondent and one of the Petitioners in an attempt to sell said shopping center (App. 28-29).

A Listing Contract was entered into on July 8, 1959 between Paul M. Schreibman and the Petitioner, L. I. Combs, Jr., which Listing Contract provided for a real estate commission upon the sale of said shopping center. The Respondent did not have a Real Estate Broker's License at the time the Listing Contract was entered into on July 8, 1959.

The State of Indiana had in effect a law that it was unlawful for any person to act as a Real Estate Broker without first having procured a license. The Act further defined that anyone who for a fee or commission negotiates the sale, or lists, or attempts or agrees to list, or directs in procuring of prospects, or negotiates or closes any transaction, which does or is calculated to result in a sale is a Real Estate Broker. It further provided that a single act performed for a commission in selling or negotiating by any broker required the Indiana Real Estate Broker's License and provided penalties for each violation of the Act.

Respondent submitted the proposal to sell to prospective purchasers prior to any Listing Contract having been entered into (App. 44). Respondent had no license during this period.

On July 8, 1959, Respondent brought a Mr. Babin as a prospective purchaser to see the Petitioners and the property involved (App. 43). At this time, the prospective purchaser and Petitioner, L. I. Combs, Jr., had presumably agreed on all the terms to a sale and only needed the

preparation of the final papers which were to be prepared by the said Mr. Babin (App. 31-33 and 43). It was at this time that the Respondent and the Petitioner, L. I. Combs, Jr., executed a Listing Contract which is the basis for the suit for a commission filed by this Respondent (App. 44). At this time, the Respondent still had no Indiana Real Estate License (App. 44).

On August 4, 1959, the parties met presumably to sign the sale papers but some objections were voiced by the Petitioners to the papers prepared by Mr. Babin. Closing of the deal was delayed (App. 77-78). Respondent first obtained his Indiana Real Estate License on August 10, 1959 (App. 27). Respondent continued his negotiations between the same purchaser and the Petitioner, L. I. Combs, Jr., and eventually in April, 1960, after another closing date had been set up, the deal fell through (App. 49). This property was never sold and Petitioners are still the owners.

The Respondent then filed suit for a commission arising out of the Listing Contract entered into on July 8, 1959. At the end of the Plaintiff's (Respondent's) case, the Court sustained the Defendants' motion for a judgment saying in effect that since the Plaintiff had no Indiana Real Estate Broker's License on July 8, 1959, Plaintiff could not recover because if recovery were permitted, Plaintiff would profit from his illegal acts. On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was reversed.

REASONS FOR GRANTING THE WRIT.

1. In a case of first impression, the Court of Appeals erroneously overruled the District Court which had tried to follow the intent of the Indiana Legislature as expressed in the entire Act passed to regulate Real Estate Brokers and providing penalties therefor.

2. Indiana decisions were impliedly overruled which hold that a contract made in violation of a statute is void.

3. Cases decided under the Indiana Real Estate Licensing Act of 1949 clearly indicate that a license must first be procured before a Real Estate Broker attempts to sell, negotiate or list property for sale.

ARGUMENT

1. If the Listing Contract executed on July 8, 1959 was illegal and void because of Respondent's failure to comply with the Indiana Real Estate Licensing Act of 1949, subsequent compliance with the Act would not have the retroactive effect of making valid acts of the Respondent done prior to the issuance of the license.

Looking at the Indiana Real Estate Licensing Act of 1949 (Burns 63-2401 - 63-2423) it is clear that the legislative intent as to the Acts' provisions are mandatory in its requirements. All through the Act the thought is expressed that any person desiring to act as a Real Estate Broker *shall first* procure a license; *shall* be unlawful, *fine shall* be imposed, each transaction *shall* be a separate offense, it *shall* constitute such person a broker and *shall* require the license, every person *shall* obtain and keep renewed a license, Commission *shall* have the power to regulate. As was said in the case of *American Vitrified Products Co.* v. *Public Service Commission* (Ind. App. 1961), 176 N. E. (2) 145, the word "shall" in a statute must be construed in its imperative and mandatory sense. If the interpretation of Sec. 8 of the Act is followed as suggested by the Court of Appeals, then the intent of the Legislature as evidenced by the remainder of the sections of the Act become a nullity and override the rest of the Act.

We believe the intent of the Act was as expressed by the District Court, that Section 8 does not exempt an unlicensed broker from the ordinary consequences of performing illegal acts. The Indiana Act appears to be similar to the statutes in Oregon and Washington and there the Courts under similar factual situations in well-reasoned

opinions followed the same line of reasoning as did the District Court. In the case of *Hunter* v. *Cunning*, 176 Ore. 250, 154 P. (2) 562 (1944), rehearing denied, 176 Ore. 250, 157 P. (2) 510 (1945), the Court said in its original opinion at page 574:

> "We hold in view of the legislative purpose as it is to be gathered from a consideration of the statute as a whole, that the expression, 'at the time the alleged cause of action arose,' is to be interpreted as meaning at the time or throughout the period when the broker performed the services which culminated in the accrual of his cause of action."

When the petition for rehearing was denied, the Court said, at page 512:

> "Mr. Hunter's contract constituted a 'listing' of real property for sale . . . such listing being a violation of our statute, the contract was illegal and could not support a suit nor could such illegal contract afterwards be ratified . . . If the contract was invalid prior to the time of performance, the invalidity could not be cured by subsequently procuring a license."

To the same effect is the case of *Irons Investment Co.* v. *Richardson*, 184 Wash. 118, 50 P. (2) 42 (1935). Speaking of legislative intent, it was said in the case of *Tannebaum* v. *Sylvan Builders, Inc.* (1959 Sup. Ct. of N. J.), 148 Atl. (2) 176, 181:

> "In our judgment, however, the legislative objective in closing the courts to the unlicensed broker was to establish a policy so strong that neither the contract nor the unlawful efforts made in its pursuit could provide the basis of pecuniary benefit to him even in tort claims of the character alleged in this proceeding."

Following the same reasoning are the following cases: *Massie* v. *Dudley* (Va. 1939), 3 S. E. (2) 176, 173 Va. 42; *Campbell* v. *Duncan* (Ark. Dist. Ct. 1949), 84 F. S. 732; *Golden* v. *Shankroff*, 211 N. Y. S. 569; *Burns* v. *Gartzman*

(1940 Pa.), 11 A. (2) 708, 139 Pa. S. 453; *Abrams* v. *Gusten* (Cal. 1952), 243 P. (2) 109; *Wegmann* v. *Mannino* (U. S. Ct. of App. 5th Cir. Fla. 1958), 253 F. (2) 627; *Stahl* v. *Town of Teaneck* (U. S. Dist. Ct. N. J. 1958), 161 F. S. 661; *Wickersham* v. *Harris* (10th Cir. 1963), 313 F. (2) 468; *Davis* v. *Chipman* (Sup. Ct. Calif. 1930), 210 Cal. 609, 293 P. 40; *Owens* v. *Capri* (Wyo. 1949), 202 P. (2) 174; *Bendell* v. *D. E. Domenicics* (N. Y.), 167 N. E. 452, 251 N. Y. 305.

2.

Although there are numerous decisions in Indiana holding that a contract made in violation of statute is void, the Court of Appeals by taking Section 8 of the Act out of context, changes this concept of the law.

The Indiana Supreme Court said in *Montpelier* v. *Mills,* 171 Ind. 175, 85 N. E. 6, that getting a license before engaging in a particular business, where it is required by law, is a condition precedent and must be strictly complied with. Contracts made in violation of a statute are void—see *Maddox* v. *Yocum* (1941), 109 Ind. App. 416, 31 N. E. (2) 652, 654; *Harris* v. *Clark,* Ind. 142 N. E. 881, 81 Ind. App. 494; *Beecher* v. *Peru Trust Co.* (1912), 49 Ind. App. 188, 97 N. E. 23, 25; *Mayfield* v. *Nole* (Ind. App. 1901), 26 Ind. App. 240, 59 N. E. 415; Williston on "Contracts", Vol. 6, Sec. 1765, pp. 5008.

3.

Since the enactment of the Indiana Real Estate Licensing Act in 1949, there have been several cases decided by the Indiana Appellate Court.

In the case of *McKenna* v. *Turpin,* 128 Ind. App. 636, 151 N. E. (2) 303 at 306-7 (1958), the plaintiff and defendant had entered into a contract for sale of lots on August 10, 1953, at which time, plaintiff had a license. On Jan. 1, 1954,

the Real Estate Broker permitted his license to lapse. At this time, the contract still had four months to run. On Jan. 19, 1954, the defendant repudiated the contract. The Court said at page 306, ". . . when the appellee lost his broker's license, he rendered further performance of the contract on his part lawfully impossible." and at page 307:

> "Furthermore it appears without dispute that on January 19, 1954, when the appellants repudiated the contract in suit, the appellee had no license to sell real estate in Indiana and had not had one since January 1st of that year. Since said contract was essentially a Real Estate Broker's contract, the appellee, by permitting his license to lapse, made lawful performance on his part impossible and rescission by the appellants was justified."

This decision certainly shows that the Indiana Appellate Court felt that it was necessary to have a license during the entire time and if during any of the proceedings, the broker slipped up and did not have his license current, the broker rendered further performance of the contract on his part lawfully impossible. This surely means that the broker must be in good standing during the entire proceedings.

The Respondent and Petitioners started dealing on April 1, 1959 and it wasn't until August 10, 1959 that the broker first obtained his license in Indiana. For four and one-third months, the Respondent had no license and the record is full of the acts that were performed by Respondent without a license. The listing contract dated July 8, 1959, upon which Respondent is attempting to recover now, could not have been lawfully entered into because he had no license. The Respondent admits the fact, he had no license at that time. Subsequent compliance does not purge prior unlawful acts.

In the case of *Folsom* v. *Callen*, 126 Ind. App. 201, 131

N. E. (2) 328 (1956), involved the question of collecting a commission and whether the acts which appellant performed were those acts which a real estate broker performed. It was admitted he had no license. The Court said the "determination of the appeal turns upon whether appellant was a real estate broker as defined in Acts 1949 . . . Sec. 63-2401-63-2423." The Court then construed the facts in relation to Sec. 63-2422 and said appellant quoted leasing and also negotiated for sale of the lease, which acts, under that section, made him a broker. The Court then said he had to have a license. Since it was admitted he had no license, he was not entitled to recover because under Sec. 63-2408, he had to allege and prove he was duly licensed at time the cause of action arose.

Sec. 63-2422 defines the term, Real Estate Broker, and says shall include all persons . . . who, for another and for a fee, commission, or other valuable consideration, . . . or upon the promise of receiving a fee, commission . . . sells, exchanges, purchases, rents or leases, or *negotiates the sale . . . or lists,* or offers or attempts or agrees to *list* . . . or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale . . . Sec. 63-2409 says any single act in selling or negotiating therefor constitutes the person a real estate broker and shall require the license herein prescribed and that it be kept renewed.

Sec. 63-2407 says it shall be unlawful to act as a real estate broker without first procuring a license and provides for penalties.

We believe, as did the District Court, that Sec. 63-2408 puts the burden of proof of alleging and proving compliance with the statute upon the person attempting to collect a commission.

If Sec. 63-2408 is interpreted as the Respondent and the Court of Appeals would have it, then what of all the acts

enumerated in Sec. 63-2422 making one a broker, and what of Sec. 63-2409 saying a single act in negotiating constitutes one a broker and requires a license, and what of Sec. 63-2407 which makes each transaction a separate offense and unlawful if a license is not first procured, and what of Sec. 63-2417 which provides for criminal prosecution for violations for not securing a license or without having renewed the license?

Finally, Sec. 63-2419, which provides the requirements for a non-resident, and further provides filing of consent to be sued in any county wherein any cause of action may arise or be claimed to have arisen out of any transaction occurring in such county, or because of any transaction commenced or conducted by such non-resident broker.

It is apparent that the District Court's interpretation of the Indiana Real Estate Licensing Act of 1949 was correct and that the Court of Appeals has erred. Unless this interpretation of the Act in the Court of Appeals' decision is corrected, conflict will arise in future cases. We believe the Court of Appeals has decided an important state question in a way that is in conflict with the applicable state law and with the clear intent of the Legislature.

The opinion and judgment of the Court below, if permitted to stand, will result in prejudice to the substantial rights of the Petitioners and to other persons whose cases might be decided in a similar fashion, contrary to the decisions and laws of the State of Indiana.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JUSTIN WAITKUS,
Attorney for Petitioners.

APPENDIX A.

COURT'S ORDER AND OPINION.

(Rendered orally November 12, 1963, and filed April 6, 1964.)

The Court: Good morning, gentlemen.

We are here on the matter of Paul M. Schreibman versus L. I. Combs, Civil 2862.

I believe the first thing is the ruling on defendants' motion for a judgment at the end of the plaintiff's case.

I want you to know, gentlemen, that you spoiled my week end and holiday, because I spent all day yesterday and most of the week end working on this—but I guess that is one of the penalties of being a Judge.

As I indicated at the time of the argument, I was concerned primarily with the question at this point of the effect of the Indiana Real Estate Licensing Act as applied to this set of facts.

I think the evidence is undisputed that negotiations between the plaintiff and defendant started in April of 1959, following the receipt of a brochure from the plaintiff stating they were in the business of selling shopping centers, and if they were interested in selling, to communicate with him.

There was a communication early in April which resulted in a meeting between the plaintiff and the President of the defendant later in the month, at which time they agreed on the listing of the property, the asking price and the amount of the down payment.

Following that, I think in the month of April, or at least soon after this meeting, a listing agreement—which is Exhibit A of the Plaintiff's Complaint—was sent out from New York to Gary for the defendant to sign. This agreement was finally executed on July 8, 1959.

In the meantime, plaintiff had submitted the proposal to sell to prospective purchasers, including Mr. Babin, the prospective purchaser, who had indicated his interest and a desire to see the property and discuss the matter with the owner.

On July 8, 1959, a meeting was arranged between the plaintiff and the prospective purchaser and the seller, at which time, according to the plaintiff and prospective purchaser, an agreement to purchase was arrived at as far as the finances were concerned, and the matters remaining to be done were the drafting of papers and proper documents and instruments to effect the purchase and sale.

The prospective purchaser, being a lawyer, was delegated the responsibility of preparing the papers. These were prepared and on August 4th, a meeting was held in Mr. Sackett's office, where the proposed contract was discussed. The matter was reviewed, some changes were agreed upon, and the prospective purchaser was again assigned the responsibility of re-drafting the papers.

While in the process of doing this, there was a communication from the seller that he did not want to sell.

Because of certain contingencies which were involved in the transaction, namely rent from Montgomery Ward leases, and the amount of the re-assessment of the real estate, and the taxes that would result, the seller did not want to sell.

The negotiations were not completely broken off; there was further communication between the plaintiff and de-

fendant, and another offer was submitted some time after the first of the year, in January or February.

In April, 1960, they had another meeting, again for the purpose of effecting a sale. When the purchaser arrived in Gary, the defendant advised him he had changed his mind and didn't want to sell.

Now, the license in this case was applied for, the real estate license was applied for on July 7th, and was issued on August 10th, 1959. Prior to that time all of the preliminary negotiations between plaintiff and defendant had taken place, the listing agreement had been signed, a prospective purchaser had been procured. They had negotiations which the plaintiff and the buyer thought was a sale; they had had a meeting with the defendants' lawyer for the purpose of working out the legal details of that sale and everything except the final closing had been done in connection with that transaction.

The question the Court must decide, of course, is whether or not, because these steps had been taken in violation of the Indiana Real Estate Licensing Act — if it was in violation of the Act—plaintiff is precluded from recovering.

Unfortunately, this is a case of first impression in Indiana. There is no Indiana law on it; but there are cases from other States on this precise subject—some in favor of the plaintiff's position, some in favor of the defendant's position.

It puts this Court in the position of trying to guess, if it can, what the Supreme Court would decide in this situation.

I have examined the cases and I am not going to review them all because I don't think it would serve any useful purpose. Where you have a situation of this kind, I suppose there are several ways which the Court might approach it: One would be to count the number of jurisdictions which have decided one way, and the number of

jurisdictions which decided the other way, and then follow the majority. I don't know where we would arrive in this case by following that solution, and I do not think it is a very sound procedure.

I think the Court should try and determine, if he is going to follow the rule of stare decisis, try to analyze the case and determine what he believes to be the best reasoning in the light of any precedent we might have in Indiana on the fundamental issues that might be involved. I have tried to do that, and have done that—how successfully, I do not know.

Admittedly, there are cases in which the Courts have said that the crucial date for a license is the day when the real estate transaction is to be closed or is closed, and the commission will then be payable. This is by virtue of the Section of the Statutes of Indiana which is Section 63-2408. Notably there is the case of Henning, an Oregon case, and also Irons Investment case from Washington—holding the opposite.

I think it is a fundamental rule—and I am certain from the research I have done that Indiana follows the rule—that ordinarily a person should not be permitted to profit from his own illegal acts.

The Indiana Real Estate law makes it a misdemeanor for anybody to engage as a real estate broker or salesman without first procuring a license. This Act applies, obviously, to non-residents as well as residents, because there is a provision which provides that a non-resident may get a license and the manner in which he may do so.

I cannot see any distinction here between a resident and a non-resident, or the fact this is an isolated or single transaction as far as the plaintiff is concerned because the Act makes it crystal clear that a single act performed for a commission or compensation of any kind will bind—

in renting, leasing, and so forth—shall constitute a violation of this Act.

I cannot believe that the Indiana Legislature, in passing this Act, intended to grant any special privilege to a nonresident over a resident.

There are cases, notably a Pennsylvania case, where they talk about a single transaction not constituting doing business within the State. Unfortunately, we do not have the benefit of the statute under which that was passed, but I do not think there is any doubt under this statute that anything done in Indiana in the way of selling or leasing real estate requires a license.

Many of the cases cited in the plaintiff's brief turn on the point of conflict of laws. We have no conflict question here because practically all of the transactions occurred in Indiana—the real estate was in Indiana, the listing agreement was made in Indiana, the contracts between plaintiff and defendant were in Indiana; contacts between defendant and prospective purchaser were in Indiana, and the contemplated contracts were negotiated in Indiana. So whatever rule you apply to determine where the contracts or contacts were made, or the contracts were contemplated, it was in Indiana, and all the negotiations leading up to it were on the site of the State of Indiana.

The cases cited in the plaintiff's brief, some of them unquestionably said that the crucial time for collection of the commission is the date of closing, or the date when the commission accrued. That date, I believe, would be a little difficult to determine in this case—although it can be, perhaps.

The other cases take the position that the date when the commission accrued has no bearing upon the subject, particularly the Hunter case; and as long as the plaintiff performed without a license in violation of the licensing act,

he is not entitled to commission, even though he had a license at the time that the deal was finally consummated, or the time when he would be entitled to his commission in the event he had a license.

The Irons case, Irons Investment Company case, I think, is properly criticized because the decision there is obiter dicta, the decision that negotiations and so forth, without license, deprives a man from his commissions even though he had a license at the time of closing, because the decision of the Court there was that he did not have a license at the time of closing.

I think the Hunter case is squarely in point with the factual situation here, with the exception that the plaintiff there, the broker was a resident of Oregon instead of a non-resident which I think makes no difference.

Plaintiff has stated that the decision of the Court in the Hunter case is obiter dicta because of this language. Under the Hunter contract of employment he was not authorized or required to negotiate or consummate a sale; he was authorized only to procure a purchaser with whom the owner should consummate a sale. The tentative offer or, rather, the inquiry of September, 1958, does not differ substantially from the inquiry of December 2nd. The license was procured between the 2nd and 9th.

There was a slight increase in the price, $1700 over the $633,500; but that was considerably more than offset by the stipulation that the buyer would pay no interest on deferred installments, and the seller should pay the taxes.

"We think if, under the circumstances, he performed his contract by procuring a purchaser ready, willing and able to purchase at the price and on terms satisfactory to the owner as required by his contract (as to which we express no opinion) he did so on December 2nd, 1938. On that date

if he had been duly licensed during the period covered by his services, he had earned his commission."

I do not understand them to say, if he had had a license on December 2nd that that would have entitled him to recover. It said, rather, had he had a license during the period of his services which, in another part of the opinion they say was during all the negotiations, then he would have been entitled to his commissions on that day.

If you follow the fundamental principle that a man should not be able to profit by virtue of his own illegal acts, then it seems to me the plaintiff here, having violated the provisions of Indiana Real Estate Act up until the time of the issuance of his license, should not be permitted to recover unless he is exempted, or the provisions, the language of Section 63-2408 takes him out of that category.

Now, what is the effect of that Section? The Section says, in substance, that in order to recover on real estate commission, it is necessary for the plaintiff to allege and prove that at the time his commission—I had better get the language—

> "At the time the cause of action arose the party seeking relief was a duly licensed real estate broker or real estate salesman in the State of Indiana."

Now the question is, does this language indicate an intention on the part of the Legislature to exempt an unlicensed broker from the ordinary consequences of performing illegal acts.

There are cases which seem to indicate that it does; the Oregon case and Washington case by way of dicta, at least, indicate it does not. There are other cases, too, but I rely primarily on these because of the factual situation.

They say, and I think with considerable logic, that it is inconceivable that the Legislature should make an act illegal, and immediately turn around and say you can es-

cape the consequences of these illegal acts. After all the illegal acts are performed, if at that time you have procured a license, that you can, nevertheless, recover.

The Oregon Supreme Court went to considerable lengths to interpret the language of what in their Act is the same as our Section 2408, and distinguish between the word "accrued" and the word "arose." I am not sure I follow exactly their reasoning in this regard; however, I must say that I do arrive at the same result.

If this Section means what the plaintiff here and what the courts have said, I think, in some cases, that a man can perform all the functions of a real estate broker, do all the acts, then postpone the date when his commission is due until some future date—between the sale and the date upon which the commission is due, run down and get a license—then I think you make this Act a complete nullity. I cannot believe this was the intention of the Legislature.

The Oregon Supreme Court came to a conclusion, as did the Washington Supreme Co rt and others, which I have read but will not discuss, that this, instead of being a limitation upon the general provisions of the Act, is a further limitation in that it requires the broker to prove—in addition to the fact he had complied with the Real Estate Licensing Act—that he had done so.

I think the purpose of 2408 is simply to change the rule of burden of proof. In the absence of 2408 the burden would be upon the defendant to prove as a matter of defense that at the time the acts were performed the broker was not licensed, and therefore not entitled to recover commission.

The Legislature, by this Act, in my opinion sought to revert the burden of proof and put the burden on the plaintiff to prove he was a licensed broker at all times.

Since I have come to that conclusion and feel this is the better reasoning, and since we have no guidelines, of Indi-

ana, of course, it follows that I must grant the motion. I may be wrong, and I invite the plaintiff to test my decision. I really would like to know. I do not know how the Seventh Circuit would rule on this.

I have done the best I can after considerable struggling with my conscience and what little reasoning power I have.

This, I think, is a rather hard decision to arrive at in this case. I do not want to comment, and I am not going to comment on the other phases of the case; I am not going to comment on the other grounds elicited in the motion. Having arrived at this decision, I do not think it necessary to do so. This is a good place to stop, and it makes an easy record on which to go up.

I am frank to say that I do not know which of the lines of cases the Seventh Circuit might follow. I think the better reasoning is found in the rule that you have to have a license at all times during all negotiations, and in all phases of the game, in order to recover a commission.

So the ruling is that the defendants' motion for judgment at the end of the plaintiff's case is granted, and plaintiff's complaint is dismissed.

Mr. Waitkus: Thank you, your Honor.

Mr. Crumpacker: If the Court please:

I feel this way: We do appreciate, at least I do, that it is a difficult question, and I think we certainly understand your Honor's reasoning.

The Court: Needless to say, you do not agree with it.

Mr. Curmpacker: No, but as I say, I think you know it is not up to me to attempt to argue or criticize.

The Court: I have read the briefs very carefully, and I say honestly that I struggled with this thing as much as anything I have had since I came on the bench. It is a hard case.

Mr. Crumpacker: We would only put it this way, if the Court please:

On one phase of it, I was wondering about the effect—I was thinking of it on the phase of listening to your Honor's comments, the effect of a motion for finding in view of the rule that the only evidence—only the evidence most favorable to the plaintiff was considered, and the fact that at least there were two separate deals, one we alleged and proved.

The Court: I thought of that, and considered it; however, if you follow the line of reasoning I have, and which the Oregon case lays down, all of this obviously was done as a result of one listing contract.

Had there been a complete break-off of negotiations after August 10th, and a completely new customer procured, and perhaps a new listing contract, then I think you would have a point. But I struggled with that problem, too.

Mr. Crumpacker: Yes.

The Court: I think the evidence shows here that this actually was one continuous transaction; it was never quite repudiated, and he just said, "I want time."

Mr. Crumpacker: Yes.

The Court: And he stated the reasons why he wanted time. There were further negotiations during the latter part of 1959 and early in 1960, and of course it was all done as a result of one listing contract which has expired, actually, but I don't think that would have bothered me very much, the fact that the listing contract had expired, because I do not think the defendant should be permitted to escape his responsibilities as long as he continued to serve after the date of the contract.

Mr. Crumpacker: All right, fine, your Honor. We are going to discuss this, of course.

The Court: I am not sure whether I am required to make special findings—of course I am required to make some finding at the final judgment, but I am not sure it is required now.

I think a transcript of what I have said this morning clearly indicates my findings and my feeling on the matter.

Mr. Crumpacker: I do, too. That would be my feeling.

The Court: I think that it would show clearly, too, as far as my ruling is concerned, that I have not seriously considered the other questions involved. On a reversal it would leave those questions open.

Mr. Crumpacker: Fine, your Honor. I think your Honor's opinion is clear.

The Court: I hope it is intelligible.

Then that concludes this matter.

APPENDIX AA.

JUDGMENT ENTERED NOVEMBER 12, 1963.

This action came on for trial before the Court, Honorable George N. Beamer, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It Is Ordered and Adjudged That the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants L. I. Combs & Sons, Inc. and L. I. Combs, Jr. and Village Shopping Center, recover of the plaintiff Paul M. Schreibman, their costs of action.

Dated at Hammond, Indiana, this 12th day of November, 1963.

KENNETH LACKEY,
Clerk of Court.

s/ By: JEAN ERICKSON,
Deputy.

APPENDIX AAA.

NOTICE OF APPEAL.
(Filed December 9, 1963.)

Notice is hereby given that the plaintiff, Paul M. Schreibman, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on November 12, 1963.

/s/ OWEN W. CRUMPACKER,
/s/ GEORGE V. BURBACH,
/s/ HAROLD ABRAHAMSON,
Attorneys for Plaintiff.

Certificate of Clerk.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 14557 September Term, 1964 September Session, 1964.

PAUL M. SCHREIBMAN,
Plaintiff-Appellant,
v.
L. I. COMBS & SONS, INC., L. I. COMBS, JR., and VILLAGE SHOPPING CENTER, INC., an Indiana Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

October 14, 1964.

Before DUFFY, CASTLE, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The issue in this diversity suit of first impression is whether a real estate broker, licensed in New York, is precluded from recovering a commission in Indiana for services rendered there under a listing contract made there, because he had no reciprocal Indiana license when the contract was made or when he performed acts as a broker under the contract. The district court, without a jury, found for defendant at the close of plain-

tiff's case and entered judgment against plaintiff.[1] We think this was error.

Early in April 1959, plaintiff Schreibman, a real estate broker licensed in New York and employed in the business of selling large commercial properties, received a letter from defendant Combs, president of defendant Village Shopping Center, Inc., about the possibility of a sale of defendants' shopping center near Gary, Indiana. Thereafter, plaintiff and Combs met, the terms of the sale were discussed, and the two men inspected the center. On July 7, plaintiff requested an application for an Indiana real estate broker's license. The next day Schreibman and defendants entered into a listing contract. Thereafter, Babin, a prospective purchaser procured by plaintiff, offered to buy the center for the listed price. Documents incorporating the terms agreed upon were prepared by Babin, an attorney, and on August 4, 1959, they were presented to the sellers' attorney. A number of changes and revisions were agreed upon and Babin amended the documents accordingly. They were sent to Combs and the attorney on August 6. On August 10, plaintiff received his Indiana license. On August 19, Babin received a letter from Combs stating that the sellers did not want to sell at that time. Babin testified that he "closed" his file on the matter.

Plaintiff continued his efforts to bring about a sale. In March 1960, Babin submitted another offer on different prices and terms and again the terms were agreed upon

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[1] Under F.R.Civ.P. 41(b), in a non-jury case, upon a motion for judgment at the end of the plaintiff's case, the court as trier of fact may decide the case on the merits and enter judgment accordingly. In so doing the court is required to state separately its findings of fact and conclusions of law according to Rule 50(b). While the court's oral opinion does not so separately state findings and conclusions, we treat the oral opinion as stating findings of fact which we must accept unless clearly erroneous.

and Babin prepared the documents. A closing date was set for April 12, 1960, but the sellers refused to complete the sale.

The district court concluded that plaintiff had acted as a real estate broker without an Indiana license and was guilty of violating the criminal provision, §63-2407,[2] of the Indiana Real Estate Licensing Act, which precluded recovery of his commission under §63-2408[3] of the Act; and that the latter statute merely added another element to the broker's burden of proof, *viz.*, the possession of an Indiana license when the cause of action "arose."

The district court relied for its conclusion on *Hunter* v. *Cunning*, 176 Ore. 250, 154 P. 2d 562 (1944), *rehearing denied*, 176 Ore. 250, 157 P. 2d 510 (1945). But the holding in that case was that the plaintiff broker was not licensed until after the date on which his cause of action arose, if at all. The statement of that court that the broker was precluded from recovery because of his violation of the criminal provision of the Oregon licensing act was dictum.

While, as the district court stated, it may be true as a general proposition of Indiana law that a person should not be permitted to profit from his own illegal acts, we are here concerned with a particular statute and the plaintiff's right of recovery must be judged under that statute. We

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[2] IND. ANN. STAT. § 63-2407 (1961). License—Unlawful acts—Violations and penalties.—On and after October 1, 1949 it shall be unlawful for any person, firm, partnership, association or corporation to act as a real estate broker or real estate salesman without first having procured a license issued by Indiana real estate commission and to have kept the same unrevoked after issuance. • • •

[3] IND. ANN. STAT. § 63-2408 (1961). Commissions—Actions to collect—Allegations.—In all actions for the collection of a commission or other compensation for the sale of real estate and filed in the courts of this state after October 1, 1949, it shall be alleged and proved therein that at the time the cause of action arose the party seeking relief was a duly licensed real estate broker or real estate salesman of the state of Indiana.

disagree with the district court's conclusion for the reasons given hereafter.

The purpose of the Indiana Real Estate Licensing Act is to protect its citizens from possible loss at the hands of incompetent or unscrupulous persons acting as brokers. A licensing commission is established to administer tests to determine whether applicants are qualified to act as brokers and to issue licenses to those found to be qualified.[4] Provision is also made for issuance of licenses without examination to licensed non-resident brokers at the discretion of the commission.[5] Section 63-2408 here in question provides that one who seeks to recover a commission must allege and prove that he was a licensed broker "at the time the cause of action arose." In order to effectuate the purpose of the Act it has been provided that only licensed persons may perform any acts as real estate brokers and criminal penalties are imposed, under §63-2407, upon those who violate this provision.

The district court's conclusion that acts in violation of §63-2407 preclude recovery of any commission in connection with the illegal acts renders the phrase "at the time the cause of action arose" in §63-2408 meaningless, for under this interpretation if a broker has engaged in any of the acts enumerated in the statute prior to obtaining a license, the entire transaction is tainted with illegality and he will not be permitted to recover, no matter when his cause of action arose. This is demonstrated by the fact that the district court decided the case below without making any finding as to when plaintiff's cause of action arose. The Oregon court, recognizing this dilemma in *Hunter*, sought to escape the dilemma by interpreting the word "arose" in the similar Oregon statute to refer to all of the acts of the broker

[4] IND. ANN. STAT. §§ 63-2401, 63-2410, 63-2411 (1961).

[5] IND. ANN. STAT. § 63-2419 (1961).

which finally culminated in a cause of action, as if the cause of action were arising over a period of time.

We have found no precedent in Indiana or in any other jurisdiction for such an interpretation of the word "arose," nor has any been cited to us in the briefs, with the exception of the *Hunter* case, and *Irons Investment Co.* v. *Richardson*, 184 Wash. 118, 50 P. 2d 42 (1935), in both of which the interpretation followed by the district court, in the case before us, was dictum, since in *Hunter* and in *Richardson* the court found that the broker was not licensed until after the date on which the last act necessary to the arising or accrual of his cause of action had taken place.

"Arose," in its usual and ordinary meaning, denotes past completed action, while the usual and ordinary means of expressing past continuing action would be "was arising." In framing §63-2408 the Indiana legislature chose the word "arose," and in the absence of some established technical meaning of the term in Indiana law, it should be read by the courts in its ordinary sense, unless the clear intent of the statute requires otherwise.

We think that this interpretation of the word "arose" signifies the substantive character of §63-2408 conferring on brokers, having an Indiana license when their cause of action arose, a right of recovery. This view is supported by the provisions of Indiana's §63-2407. Under this section each act is regarded as a separate criminal offense, punishable by a fine "to which shall be added the amount of any real estate commission paid or earned on such violation * * *." The only situation in which the forfeiture provision would be applicable would be where the broker has completed every act required to give him a right to his commission, i.e., where his cause of action has arisen. At any earlier time no commission would have been "paid or earned." The legislature did not provide that no commis-

sion may be recovered where the plaintiff committed any illegal act in connection with the events which gave rise to his right to a commission.

Our view of §63-2408 is expressed, with respect to a similar Ohio statute, in *Pierce* v. *Isabel*, 70 Ohio App. 385, 40 N. E. 2d 481 (1941) where the issue was whether the plaintiff broker was precluded from recovering a commission because his broker's license had lapsed and had not been renewed when the listing contract was entered into, although he secured a license before the parties agreed to a sale. The Ohio court held that since the cause of action did not arise until the making of the agreement to sell, which occurred after the plaintiff received his license, the plaintiff could recover.

Defendants in the case before us rely upon *Folsom* v. *Callen*, 126 Ind. App. 201, 131 N. E. 2d 328 (1956), and *McKenna* v. *Turpin*, 128 Ind. App. 636, 151 N. E. 2d 303 (1958). In *Folsom* the court held that one who had never been licensed could not recover a commission. And in *McKenna* the court's dictum was that defendant was justified in rescinding the listing contract because the broker had allowed the license to lapse. The holdings in those cases are not pertinent to our decision.

Our interpretation of §63-2408 is consistent with the purpose of the Indiana act, to protect the public against incompetent and otherwise unqualified brokers. The means selected by the legislature to protect the public in this regard is to penalize persons who act as brokers without having been certified as qualified. The district court's interpretation renders it possible for one who has employed a competent broker and benefited from his services to repudiate the listing contract and deprive the broker of his commission if the latter performed any act, pursuant to the contract, which was proscribed by the statute. We think

that our construction of the statute provides the public with the protection intended by the legislature without opening the door unnecessarily to potential injustices.

A competent broker, licensed in another state, who becomes licensed in Indiana before his cause of action arises should be permitted to recover his commission under §63-2408 under the circumstances present in this case. Plaintiff's competence is not questioned. He was licensed as a real estate broker in New York and was granted a license in Indiana without any examination being required. His license also was renewed without question for the year 1960. Combs, who was himself a licensed Indiana broker, sought out and employed plaintiff and attempted unsuccessfully to induce him to split the commission.

We hold that the fact that plaintiff was not licensed on July 8, 1959, when the listing contract was entered into, does not itself render that contract void and does not preclude recovery.

The district court should have determined, under the listing contract, what plaintiff had to do to earn his commission, and further should have decided if and when plaintiff's cause of action for recovery of the commission "arose" under §63-2408.

For the reasons given, the judgment is reversed and the cause remanded for further proceedings consistent with the views expressed.

APPENDIX C.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Monday, November 16, 1964.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

PAUL M. SCHREIBMAN,
Plaintiff-Appellant,
No. 14557 *vs.*
L. I. COMBS & SONS, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D.

Sec. 1254. Courts of appeals: certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. (June 25, 1948, c. 646, 62 Stat. 928.)

APPENDIX E.

CHAPTER 44.

An Act regulating real estate brokers and real estate salesmen, and prescribing penalties for the violation thereof.

[H. 41. Approved March 2, 1949.]

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. There is hereby created a Commission which shall be known as "Indiana Real Estate Commission," and as such empowered to carry out the provisions of this Act. Said Commission shall consist of one district member from each Congressional District of this state and two citizen members at large all to be appointed by the Governor of this state within sixty days after passage of this act. Members at large shall be citizens and residents of this state for not less than six years and not engaged in the real estate business. All district members so appointed shall be citizens and residents of this state and of the particular district for not less than six years and shall have engaged in business as active real estate brokers for not less than ten years prior to such appointment. On original appointment of all members and to be so designated, three shall be named for one year, three for two years, three for three years, and the remaining members for four years, all terms to run from May 1, 1949. Upon expiration of such terms the Governor shall appoint successors for four years, except appointments made in case of vacancies, and upon such vacancies occurring such appointments shall be for the unexpired term. All persons

thereafter appointed for a new term or to a vacancy shall possess the qualifications as herein provided for an original appointment and in addition thereto all district members shall be duly licensed real estate brokers. No person shall act as a member of the Commission while holding another elective or appointive office either state or federal.

SEC. 2. The original members appointed to the Commission shall meet within thirty days and shall organize and shall select one of their members as Chairman to serve for one year. The Commission shall appoint an Executive Secretary who shall not be a member of the commission. It shall be the duty of the Executive Secretary to keep a record of all proceedings, transactions, communications and official acts and records of the Commission and to perform such other duties as the Commission may require. The Commission shall engage such other employes, shall fix all salaries, terms of employment, and make such other contracts and expenditures as its duties may require, subject to the provisions of this Act. The office, files, records and property of the Commission shall be maintained in the City of Indianapolis.

SEC. 3. The Executive Secretary shall call all meetings of the Commission as directed by the Chairman or requested in writing by seven or more members, and at such times and places as its business may require. Sufficient notice shall be given as will permit members to attend all meetings. A record shall be kept of all proceedings at meetings and of the vote taken on each act or deed of the Commission and a majority vote of all members shall be required to bind the Commission.

SEC. 4. Members of the Commission shall receive no salaries, but shall be paid only actual and necessary traveling expenses in attending meetings or while performing other duties as directed by the Commission.

SEC. 5. The Commission is empowered to adopt and promulgate rules and regulations for its guidance and for the regulation of its business and procedure so far as consistent with or in furtherance of this Act pursuant to the laws of the State of Indiana.

SEC. 6. The Commission shall adopt a seal with the words, "Indiana Real Estate Commission" and such other device as may be selected, by which it shall authenticate the acts of the Commission. Copies of all records and papers when certified by the Executive Secretary and issued under the Seal of the Commission shall be received in evidence in all cases equally and with like effect as the original records.

SEC. 7. On and after October 1, 1949 it shall be unlawful for any person, firm, partnership, association or corporation to act as a real estate broker or real estate salesman without first having procured a license issued by Indiana Real Estate Commission and to have kept the same unrevoked after issuance. Upon conviction a fine of not less than fifty dollars nor more than one thousand dollars to which shall be added the amount of any real estate commission paid or earned on such violation, shall be imposed for each violation of this Act. Each transaction shall be regarded as a separate offense and shall be punished as such.

SEC. 8. In all actions for the collection of a commission or other compensation for the sale of real estate and filed in the Courts of this State after October 1, 1949, it shall be alleged and proved therein that at the time the cause of action arose the party seeking relief was a duly licensed real estate broker or real estate salesman of the State of Indiana.

SEC. 9. A single act performed for a commission or compensation of any kind, in the buying, selling, exchanging, leasing or renting of real estate or in negotiating

therefore for others shall constitute the person performing any of such acts, a real estate broker or real estate salesman and shall require the license herein prescribed and the same to be renewed as herein prescribed and in no wise revoked or canceled by the Commission. Every person acting for himself, every member of a firm, partnership, association or corporation participating or engaged in the real estate brokerage or as a real estate salesman therefor shall obtain and keep renewed and wholly unrevoked a license as a real estate broker or real estate salesman as herein required.

SEC. 10. Any person, desiring to act as a real estate broker or real estate salesman, must file an application for a license with the Commission. The application shall be in such form and detail, as the Commission shall prescribe, setting forth the following: (1) The name and address and age of the applicant or the name under which he intends to conduct business and, if the applicant be a partnership, the name and residence address of each member thereof and the name under which the partnership business is to be conducted; and if the applicant be a corporation, the name and address of each of its principal officers. (2) The place or places, including the city, town or village with the street and street number, if any, where the business is to be conducted. (3) Such other information as the Commission shall require.

SEC. 11. The Commission shall require all applicants for license to pass a written and oral examination to be taken before the Commission on questions pertaining to sale, listing and procedures involved in dealing with real estate, and to obtain thereon a grade previously established as a passing or satisfactory grade. If the applicant is a partnership all members thereof shall pass such examination, and if the applicant is a corporation, all officers or

agents thereof seeking to engage on its behalf as a real estate broker or salesman shall pass such examination.

SEC. 12. Applicants for a broker's examination shall pay with such application an examination fee of $5.00 and a license fee of $10.00. Applicants for a salesman's license shall pay with such application an examination fee of $5.00 and a license fee of $5.00. Applicants who fail to pass the examination shall have returned to them the license fee so paid. Such licenses shall each expire on the 1st day of January of each year unless renewed prior thereto and the annual fee paid in the amount as required on original issue.

SEC. 13. The Commission shall prescribe the form of licenses and issue the same under its seal. The real estate broker shall display his license in his place of business and hold and keep the license of each salesman in his employ. Each licensee shall also have issued a pocket card certifying that he is duly licensed as a broker or a salesman, the date of expiration of license, and if a salesman, the name of employer.

SEC. 14. All moneys received by the Commission under this Act shall be paid to the Executive Secretary of the Commission, who shall give a proper receipt for the same, and shall at the end of each month, report to the Auditor of the State the total amount received by him under the provisions of this Act, from all sources, and shall at the same time, deposit the entire amount of such receipts with the State Treasurer, who shall place them to the credit of a special fund to be created and known as the "Real Estate Commission Fund". The Commission shall, by its Chairman and Executive Secretary from time to time, certify to the Auditor of State the necessary expenses incurred by said commission, and the Auditor shall issue his warrant for the same, which shall be paid out of the

funds so established for the maintenance of said Commission: Provided, that no order shall be drawn by state officials on any fund other than the above named fund for any salaries or expenses of the Commission incident to the administration of this Act. All funds so paid to the Treasurer of the State, in excess of five thousand ($5000), shall be turned over to the General Fund and shall remain and be a separate and permanent fund for the maintenance of the Commission.

SEC. 15. The Commission shall have the power to regulate the issuance of licenses and to suspend or revoke licenses either on its own motion or of a member thereof or on complaint of any other person whenever a licensee is alleged to be guilty of any of the following: (1) Failing to account and remit any moneys coming into his possession belonging to others; (2) Accepting, giving or charging any undisclosed commission, rebate or direct profit on expenditures made for a principal; (3) Acting in a dual capacity of broker and undisclosed principal in any transaction; (4) Guaranteeing or authorizing or permitting any person to guarantee future profits which may result from the resale of real property, offering it for sale or rent without the written consent of the owner or his authorized agent; (5) Offering real property for sale or lease without the knowledge or consent of the owner or his authorized agent or on any terms other than those authorized by the owner or his authorized agent; (6) Inducing any party to a contract of sale or lease to break such a contract for the purpose of substituting, in lieu thereof, a new contract with another principal; (7) Accepting employment or compensation for appraising real property contingent upon the reporting of a predetermined value or issuing an appraisal report on real property in which he has an undisclosed interest, unless such interest is disclosed in the report; (8) Nego-

tiating a sale, exchange or lease of real property directly with an owner or lessor if he knows that such owner has a written outstanding contract, in connection with such property, granting an exclusive agency to another broker; (9) Soliciting, selling, or offering for sale real property by offering "free lots" or conducting lotteries for the purpose of influencing a purchaser or prospective purchaser of real property; (10) Representing or attempting to represent a real estate broker, other than the employer, without the express knowledge or consent of the employer; (11) Paying a commission or compensation to any person for performing the services of a real estate broker or real estate salesman who has not first secured his license under this Act; (12) The broker or salesman shall have been convicted of felony.

The complaint or statement of offenses shall be reduced to writing and shall be filed with the commission. A member or members of the commission shall then be assigned to hear the evidence in relation to such complaint and which hearing shall be in the county of the residence of person so accused. All proceedings in relation to the hearing, notices, rights of parties, and reports to the commission and its findings and the right of review thereof shall thereafter be in accordance with the Act concerning proceedings, orders and determinations of State Officers and Agencies and judicial review thereof in accordance with the Act of the General Assembly of the State of Indiana, being Acts of 1947, Chapter 365, page 1451 thereof or such Acts as may be adopted from time to time by way of amendment thereof.

SEC. 16. The Attorney General of the State shall render to the Indiana Real Estate Commission opinions on all questions of law, relating to the interpretation of this act or arising in the administration thereof, and shall act as attorney for the said commission in all actions and

proceedings brought by or against it under or pursuant to any of the provisions of this act.

SEC. 17. The Attorney General, the Indiana Real Estate Commission or the prosecuting attorney of any county wherein any person not herein exempted shall engage in the practice of real estate brokerage or act as real estate salesmen as herein defined without first having obtained license so to do or without a renewal thereof or so acting after the revocation of any such license may, in accordance with the provisions of the laws of this state governing injunctions maintain an action in the name of the State of Indiana to enjoin such persons so engaging in practice of real estate brokerage or real estate salesmanship as herein defined until a license is secured or renewed in accordance with the provisions of this Act. Any person who has been so enjoined and who shall violate such injunction shall be punished for contempt of court. Such injunction shall not relieve such person so practicing real estate brokerage or acting as real estate salesmen without securing a license or without the renewal thereof or after the revocation thereof from a criminal prosecution therefor as is provided by this act but such remedy by injunction shall be in addition to any remedy provided for herein for the criminal prosecution of such offenders. In charging any person in acomplaint for an injunction or in affidavit, information or indictment with the violation of the provisions of this act by practicing real estate brokerage or engaging as real estate salesman without securing the license or without having renewed the same or after recocation of any such license, it shall be sufficient to charge that he did upon a certain day and in a certain county engage in the practice of real estate brokerage or act as a real estate salesman, he not having a license or he not

having renewed the same or he having so acted after revocation of any such license without averring any further or more particular facts concerning the same.

SEC. 18. Should the broker change his place of business or a salesman his place of employment, he shall forthwith notify the commission in writing of such change and thereupon a new pocket card shall be granted to the broker or salesman at such new place of business for the unexpired portion of the term. If any real estate salesman changes his place of employment the broker shall, forthwith return the license of such salesman to the commission. The salesman shall be notified, at his last known place of residence, that his license has been returned to the commission.

SEC. 19. A nonresident of this State, who is actively engaged in the real estate business, who maintains a place of business in another state and who has been duly licensed in such other state to conduct such business in that state, if such license is required in such state, may at the discretion of said commission, become and be entitled to conduct the business of a real estate broker in this state by filing with the said commission, a duly authorized or certified copy of the license issued to such nonresident for the conducting of such business in any other state, and where no license is required in such state, due proof of good character and real estate brokerage reputation and by paying to the said commission the same license fees as is herein provided for the obtaining of a broker's license in this state; provided, that such nonresident broker shall file with the commission a written consent that action and suits at law may be commenced against such nonresident broker in any county of this state wherein any cause of action may arise or be claimed to have arisen out of any transaction occurring in such county or because of any transaction commenced or conducted by such nonresident

broker or his agent or employees in such county; and such consent shall provide that service of summons in any such action may be served upon the said commission, for and on behalf of said nonresident broker, and such service shall be held to be sufficient to give the court jurisdiction over such nonresident broker and his salesman or agent conducting any such transaction in any county.

SEC. 20. Licenses without examination. Any resident of this state who has been an active broker or real estate salesman for at least six months prior to January, 1949 shall be granted a license as a Real Estate Broker or Real Estate Salesman to do a real estate business without examination upon making application before October 1, 1949 to the Indiana Real Estate Commission and paying the required fee.

SEC. 21. The provisions of this act shall not apply (a) to any person who as owner or lessor shall perform any acts in relation to property owned or leased by himself or the husband, wife, son or daughter, brother or sister of said owner or lessor; (b) be construed to include in any way the services rendered by any attorney at law in the performance of his duty as such attorney at law or (c) be held to include, while acting as such, a receiver, a commissioner, a trustee in bankruptcy, and administrator or executor, or other officer named by a court for the selling of real estate under the order of any court, or a sheriff or other officer in the enforcement of any order or judgment of any court, a trustee under a trust agreement, deed or trust or will, or an auctioneer, employeed by a receiver, trustee in bankruptcy, administrator, executor or trustee, to aid and assist in conducting a public sale held by any such officer.

SEC. 22. The term "real estate" and "owner of real estate" shall include all oil rights and interests in Real Estate and including leaseholds, oil leases, oil royalties and all other conveyances of oil or mineral rights. The term

"real estate broker", within the meaning of this act shall include all persons, partnerships, associations and corporations, foreign and domestic who, for another and for a fee, commission, or other valuable consideration, or who with the intention, in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, sells, exchanges, purchases, rents or leases, or negotiates the sale, exchange, purchase, rental, or leasing of, or offers, or attempts, or agrees to negotiate the sale, exchange, purchase, rental or leasing of or lists or offers or attempts or agrees to list, or appraises, or offers or attempts or agrees to appraise, or acution, or offers or attempts or agrees to auction, any real estate, or business enterprise, or the improvements thereon; or who buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate or the improvements thereon; or who collects or offers or attempts or agrees to collect rental for the use of real estate, or who advertises or holds himself, itself or themselves out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate, or assists, or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate. The term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or ther parcels of real estate, at a stated salary, upon a commission, upon a salary and commission basis or otherwise to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer, attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

The term "real estate salesman" shall include any person who, for a salary, commission or compensation of any kind, is employed either directly, indirectly, regularly or

occasionally, by any real estate broker to sell, purchase, or negotiate for the sale, purchase, exchange or renting of any real estate.

SEC. 23. The word or term "he" as used in this act, shall also mean and include "she" and "it". The word or term "his" as used in this act, shall also mean and include "her" and "its". The word or term "person" as used in this act, shall also mean and include "partnership", "Association" or "corporation."

SEC. 24. If any section, sentence, clause, phrase, or requirement of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion hereof. The General Assembly hereby declares that it would have passed this act and each such section, sentence, clause, phrase, or requirement herein irrespective of the fact that any one or more sections, sentences, clauses, phrases or requirements be declared unconstitutional.

SEC. 25. Nothing contained in this act shall be deemed to in any way repeal or modify or affect the provisions of the Acts of 1913, Chapter 219, page 638 Burns Statutes 1933, Section 33-104. All other laws or parts of law in conflict with this Act are hereby repealed.

SEC. 26. Whereas an emergency exists for the immediate taking effect of this act it shall be in full force and effect from and after its passage.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 764

L. I. COMBS & SONS, INC., L. I. COMBS, JR., and VILLAGE SHOPPING CENTER, INC., an Indiana Corporation,

Petitioners,

v.

PAUL M. SCHREIBMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTION.

As stated in the Petition, jurisdiction of this Court is being invoked under Title 28 U.S. Code, Section 1254 (1). However, respondent respectfully submits that Rule 19 of the Supreme Court Rules is pertinent on the question

of the jurisdiction of this Honorable Court in the case at bar. Under Rule 19, the Petition, of necessity, is based on the ground that the United States Court of Appeals for the Seventh Circuit has "decided an important state • • • question in a way in conflict with applicable state • • • law."

QUESTION PRESENTED.

Whether this Court will issue a writ of certiorari to a Circuit Court of Appeals to review that Court's interpretation of one section of the Indiana Real Estate Licensing Act, which section has never been construed by the Indiana state courts, and where, therefore, both the District Court and the Circuit Court had to surmise what construction the Indiana state courts would place upon it?

STATEMENT OF FACTS.

In April of 1959, the respondent (plaintiff below) was contacted by one of the petitioners, L. I. Combs, Jr., in connection with his serving as a real estate broker for the sale of the Village Shopping Center which is located in Gary, Indiana. (App. 28) By a letter dated April 3, 1959, the respondent replied to the letter of Mr. Combs, expressing his interest in acting as a broker for the sale of the shopping center. (App. 28) After an exchange of correspondence and a personal meeting of the respondent and the petitioner Combs, it became apparent that Mr. Schreibman would be engaged as the broker in the proposed sale of the shopping center. (App. 27-28) Therefore, on July 7, 1959, the respondent requested an application for an Indiana real estate broker's license from the Board of Real Estate Commissioners in Indianapolis, Indiana. (App. 27)

Under rules and regulations of the Board of Real Estate Commissioners, it was not necessary for the respondent to take a broker's examination in order to obtain an Indiana license, as he was able to apply for a reciprocal license since he was a licensed broker in the State of New York. It was only necessary that he pay the necessary fees, which he did. (App. 27) On July 8, 1959, a listing agreement was duly executed by the petitioner, L. I. Combs, Jr., as president of the petitioner Village Shopping Center, Inc., and the respondent. The listing agreement gave Mr. Schreibman exclusive authority to negotiate the sale of the Village Shopping Center. (App. 30) Meanwhile, the respondent's application for an Indiana license was submitted to the Board of Real Estate Commissioners at its July 29th meeting, at which time it was recommended that a reciprocal license be issued. (App. 27) The re-

spondent actually received his Indiana license on August 10, 1959, when he received a letter from the Indiana Board of Real Estate Commissioners which stated:

> "Your application for broker's license by reciprocal city was presented at the July 29 meeting of the Commission, and it is the recommendation of the Commission that this reciprocal license be issued." (App. 27, Tr. 107)

On July 8th, respondent brought with him to Gary a prospective purchaser, Elmer Babin, who was favorably impressed with the shopping center and who offered to purchase the center for the listed price. (App. 30-31) Documents incorporating the terms agreed upon were prepared by Mr. Babin, an attorney, and on August 4, 1959, they were presented to the sellers' attorney. (App. 68)

A number of changes and revisions were agreed upon and Mr. Babin amended the documents accordingly. They were sent to Mr. Combs and his attorney on August 6th (App. 68-71). On August 19th, Mr. Babin received a letter from Mr. Combs stating that the sellers did not want to sell at that time. Mr. Babin then "closed" his file on the matter. (App. 72)

Respondent, however, continued his efforts to bring about a sale. (App. 38-39) In March, 1960, Mr. Babin submitted another offer on different prices and terms and again these terms were agreed upon and Mr. Babin prepared the documents. A closing date was set for April 12, 1960, but the sellers again refused to complete the sale. (App. 40-4)

Thereafter, plaintiff filed this suit to recover his broker's commission. The District Court entered judgment for the defendants (petitioners here) at the close of the plaintiff's evidence and the Circuit Court of Appeals for the Seventh Circuit reversed and remanded for further proceedings.

ARGUMENT.

I.

UNDER POINT ONE OF THEIR ARGUMENT, PETITIONERS FAIL TO POINT OUT WHERE THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH INDIANA LAW.

The decision of the United States Court of Appeals for the Seventh Circuit, as well as the decision of the District Court, was based solely upon the construction of one section of the Indiana Real Estate Licensing Act, namely Burns' § 63-2408, which reads as follows:

> "In all actions for the collection of a commission or other compensation for the sale of real estate and filed in the courts of this state after October 1, 1949, it shall be alleged and proved therein that at the time the cause of action arose the party seeking relief was a duly licensed real estate broker or real estate salesman of the State of Indiana."

The District Court construed the statutory language "at the time the cause of action arose" as requiring a person suing for a real estate commission to allege and prove that he was duly licensed as a broker before even entering into a listing contract. The Circuit Court of Appeals construed Burns' § 63-2408 as only requiring a party to allege and prove that he was duly licensed "at the time his cause of action arose," hence, reading the latter phrase in its ordinary legal sense. In so construing Burns' § 63-2408, the Seventh Circuit found it necessary to remand the case for further proceedings in the District Court. The Seventh Circuit stated:

"We hold that the fact that plaintiff was not licensed on July 8, 1959, when the listing contract was entered into, does not itself render that contract void and does not preclude recovery.

The district court should have determined, under the listing contract, what plaintiff had to do to earn his commission, and further should have decided if and when plaintiff's cause of action for recovery of the commission "arose" under § 63-2408.

For the reasons given, the judgment is reversed and the cause remanded for further proceedings consistent with the views expressed." (App. B, p. 31 of Petition)

The significant factor in each of the decisions and opinions below is that neither court based its decision upon an Indiana decision construing this particular section of the licensing act. The District Court, during the course of its opinion, conceded the fact that there was no Indiana case construing this pertinent language. The Court stated:

"Unfortunately, this is a case of first impression in Indiana. There is no Indiana law on it; but there are cases from other States on this precise subject—some in favor of the plaintiff's position, some in favor of the defendants' position. It puts this Court in the position of trying to guess, if it can, what the Supreme Court would decide in this situation." (App. A, p. 15 of Petition)

Again, the District Court stated:

"Since I have come to that conclusion and feel this is the better reasoning, and since we have no guidelines, of Indiana, of course, it follows that I must grant the motion. I may be wrong, and I invite the plaintiff to test my decision. I really would like to know. I do not know how the Seventh Circuit would rule on this." (App. A, pp. 20-21 of Petition)

The Circuit Court of Appeals, likewise, recognized the lack of Indiana authority when Judge Kiley stated in his opening sentence that the present appeal was one of "first impression". (App. B, p. 25 of Petition)

It is respectfully submitted that the petitioners, themselves, concede this significant fact by the nature of their argument under what has been designated as Point 1 in the argument section of their Petition. It is to be noted that the authorities cited by the petitioners to support their proferred construction of Burns' § 63-2408 are decisions arising in other states. Not one Indiana decision is cited in support of the construction proferred by the petitioners and followed by the District Court below.

Petitioners rely primarily upon *Hunter* v. *Cunning* (1944) 176 Ore. 250, 154 P. 2d 562 and *Irons Investment Co.* v. *Richardson* (1935) 184 Wash. 118, 50 P. 2d 42. A reading of the District Court's opinion clearly indicates that the lower court was relying primarily upon these decisions in rendering its interpretation of the pertinent section of the Indiana Real Estate Licensing Act. As pointed out in the opinion of the Circuit Court of Appeals, these cases do offer some support, by way of dictum, to the petitioners' petition. However, the Circuit Court of Appeals believed that the better-reasoned construction of the licensing act was expressed by other foreign decisions. Notably is the case of *Pierce* v. *Isabel* (1941) 70 Ohio App. 385, 40 N.E. 2d 481. (See other cases cited in Appellant's Brief.)

Therefore, it is respectfully submitted that petitioners fail completely Under Point 1 to point out to this Honorable Court where the decision of the United States Court of Appeals for the Seventh Circuit is in conflict with Indiana law.

II.

UNDER POINT TWO OF THEIR ARGUMENT, PETITIONERS FAIL TO POINT OUT WHERE THE DECISION OF THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE INDIANA LAW.

Under what they designate as Point 2 of their argument, petitioners assert that the Court of Appeals, by its decision, has ignored numerous decisions in Indiana holding that a contract made in violation of a statute is void.[1] In support of this assertion, the petitioners cite five Indiana cases.

Yet it is respectfully submitted that the principle of law enunciated by these cases is not applicable to the case at bar. For in each of the licensing acts in question in the cases cited by the petitioners, the legislature had failed to expressly provide the time at which a license was necessary in order to enforce a contract for compensation. Therefore, it was not illogical for the Indiana courts, in these cases, to hold that a contract entered into before the acquiring of a license was void. But the Indiana Real Estate Licensing Act, unlike the licensing statutes involved in the cases relied upon by the petitioners, contains an express provision which states the time at which a broker's license is necessary if the person acting as a broker is to have a legal right to claim compensation for his services. This express provision is Burns' § 63-2408, *supra*. Hence, the Circuit Court of Appeals correctly stated:

---

[1] It is to be noted that the Indiana Real Estate Licensing Act (being Burns' § 63-2409) does not require a license prior to the execution of a listing contract; therefore, petitioner's premise is, in fact, invalid.

> "While, as the District Court stated, it may be true as a general proposition of Indiana law that a person should not be permitted to profit for his own illegal acts, we are here concerned with a particular statute and the plaintiff's right of recovery must be judged under that statute." (App. B, p. 27 of Petition)

Therefore, it is obvious that the proposition of law for which these cases stand is not applicable to the case at bar and, hence, that petitioners have failed to demonstrate to this Honorable Court the soundness of their assertion that the Court of Appeals' decision has changed a concept of law established by the Indiana Appellate Courts.

III.

UNDER POINT THREE OF THEIR ARGUMENT, PETITIONERS ONCE AGAIN FAIL TO POINT OUT WHERE THE DECISION OF THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE INDIANA LAW.

Being unable to cite to this Honorable Court any Indiana decision interpreting Burns' § 63-2408 under Point 1 of their argument, petitioners attempt under Point 3 to furnish Indiana authorities to support their assertion that the decision of the Seventh Circuit is "contrary to the decisions and laws of the State of Indiana." (Petition, p. 11)

It is respectfully submitted that the Indiana decisions cited by the petitioners, like the cases cited under their Point 2, are simply not applicable to the issue faced by the lower courts. Although both cases were cited to the District Court by the petitioners (defendants below), that court did not rely upon either authority in reaching its decision in favor of the petitioners. Indeed, the District Court believed that neither case was pertinent in deciding

the issue before it, since the Court stated in the course of its opinion that "this is a case of first impression in Indiana; [t]here is no Indiana law on it." (App. A, p. 15 of Petition) The Circuit Court of Appeals expressly noted the irrelevancy of both of these cases during the course of its opinion:

> "Defendants in the case before us rely upon *Folsom* v. *Callen*, 126 Ind. App. 201, 131 N.E. 2d 328 (1956), and *McKenna* v. *Turpin*, 128 Ind. App. 636, 151 N.E. 2d 303 (1958). In *Folsom* the court held that one who had never been licensed could not recover a commission. And in *McKenna* the court's dictum was that defendant was justified in rescinding the listing contract because the broker had allowed the license to lapse. The holdings in those cases are not pertinent to our decision." (App. B, p. 30 of Petition)

Finally, petitioners attempt to construct some sort of an argument based upon other sections of the Indiana Real Estate Licensing Act. It is respectfully submitted that petitioners fail to demonstrate that these licensing statutes support only one reasonable construction of Burns' § 63-2408, or, namely, the construction placed upon this section by the District Court. On the contrary, the opinion of the Seventh Circuit clearly reveals that its consruction of Burns' § 63-2408 is supported by these very same sections of the licensing statute. As stated by the Appeals Court:

> "We think that this interpretation of the word 'arose' signifies the substantive character of § 63-2408 conferring on brokers, having an Indiana license when their cause of action arose, a right of recovery. *This view is supported by the provisions of Indiana's § 63-2407.* Under this section each act is regarded as a separate criminal offense, punishable by a fine 'to which shall be added the amount of any real estate

> commission paid or earned on such violation * * *.' The only situation in which the forfeiture provision would be applicable would be where the broker has completed every act required to give him a right to his commission, *i.e.*, where his cause of action has arisen. At any earlier time no commission would have been 'paid or earned.'" (App. B, p. 29 of Petition; emphasis added.)

Therefore, once again, petitioners have failed to demonstrate to this Honorable Court where the decision of the Circuit Court of Appeals is in conflict with applicable decisions or statutes of the State of Indiana.

CONCLUSION.

A mere reading of the opinions of the District Court and the United States Court of Appeals for the Seventh Circuit reveals that both courts were cognizant of the fact that there was no Indiana decision on the precise question before both Courts. Again, it is obvious from a mere reading of the opinions that both Courts merely construed one section of the Indiana Real Estate Licensing Act, relying in each instance upon foreign authority to support their decisions. As such, it is clear that the decision rendered by the United States Court of Appeals for the Seventh Circuit is not in conflict with any applicable Indiana law.

This being the case, petitioners were unable to demonstrate in the course of their Petition just where the decision of the Court of Appeals conflicted with Indiana law. Therefore, under Rule 19 of this Honorable Court,

it is respectfully submitted that the petitioners have failed to demonstrate "special and important reasons" for the granting of their petition for a writ of certiorari.

Wherefore, Respondent respectfully prays that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

OWEN W. CRUMPACKER,
HAROLD ABRAHAMSON,
RICHARD P. KOMYATTE,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 764

L. I. COMBS & SONS, INC., L. I. COMBS, JR. AND VILLAGE SHOPPING CENTER, INC., AN INDIANA CORPORATION,

Petitioners.

vs.

PAUL M. SCHREIBMAN,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S ANSWER.

JUSTIN WAITKUS,
Counsel for Petitioners.

JUSTIN WAITKUS,
Counsel for Petitioners,
569 Broadway,
Gary, Indiana.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondent.

PETITIONERS' REPLY TO RESPONDENT'S ANSWER.

In answer to Respondent's contention that under Rule No. 19 of the Supreme Court, the Petitioners have not shown that the Court of Appeals has "decided an important State question in a way in conflict with applicable State law," we disagree.

The entire Indiana Real Estate Licensing Act must be examined. It is clear that under the aforesaid Act, there can be many different types of violations. It is also clear that under the aforementioned Act, the Respondent should have first procured a license. This was not done until August 10, 1959. The contract upon which this Respondent bases his lawsuit was entered into on July 8, 1959.

Under the aforesaid Act, the Real Estate Broker's License had to be kept in force at all times.

The Indiana Real Estate Licensing Act also provides in Section 19 (Indiana Burns Statutes, Sec. 63-2419) that a non-resident *may at the discretion of said Commission become entitled to conduct business of a Real Estate Broker in this State;*

and

by having the non-resident broker file a certified copy of the license issued to him in any other State;

and

plus payment of license fees;

and

plus filing of any consent by the non-resident broker that actions or suits-at-law may be commenced against him in any County of the State wherein any cause of action may arise or be claimed to have arisen out of any transaction occurring in such County or because of any transaction commenced or conducted by such non-resident broker;

and

further provides service of summons on the non-resident broker or his agent for conducting any such transaction in any County.

This Section 19 of the Indiana Real Estate Licensing Act obviously is contrary to Respondent's contention that he was entitled to a reciprocal license merely by requesting an application for a license.

The Indiana Real Estate Licensing Act specifically says in Section 7 (Indiana Burns Statutes 63-2407) that a broker must *first* procure a license and keep it *unrevoked*. This obviously shows the intent of the Legislature and as shown by the cases that a broker, under the Act, must have a license in effect at all times during the carrying on of the transaction.

The cases heretofore referred to in Indiana, namely: *McKenna* v. *Turpin* (Ind. App. 1958), 15 N. E. (2) 303, 306, 307, 128 Ind. App. 636, and *Folsom* v. *Callen* (1956), 126 Ind. App. 201, 131 N. E. (2) 328, have already interpreted the Indiana Real Estate Licensing Act regardless of whether the Court of Appeals for the Seventh Circuit admits that such interpretation was made. The Court of Appeals definitely ignores the full intent and scope of the Indiana Licensing Act, and has attempted to decide this case on a narrow interpretation of one clause in one section of the Act. The Court of Appeals has ignored the Indiana decisions referred to, and also ignored the Indiana Real Estate Licensing Act, which clearly indicates the intent of the Legislature when it passed the Act, and further the Court of Appeals has ignored the strict and stringent scope of this Act.

It is clear under the Indiana Real Estate Licensing Act and the decisions of the State of Indiana clearly show that any transactions illegally entered into were void, and any commissions were uncollectible by any broker who failed to strictly comply with the Indiana Real Estate Licensing Act.

This contention is supported by the decisions in *Hunter* v. *Cunning* (Ore. 1944), 154 Pac. (2) 562, 574, 176 Ore. 250 (Ore. 1945), 157 Pac. (2) 510, 512, 176 Ore. 250; and *Irons Investment Co.* v. *Richardson* (Sup. Ct. 1935 Washington), 50 Pac. (2) 42, 45, where the States of Oregon and Washington have similarly worded statutes to those of Indiana, and as to which decisions the District Court said that he arrived at the same result under the same or similar phraseology.

The District Court, we believe correctly interpreted the statute as meaning that the Act did not exempt an unlicensed broker from the ordinary consequences of performing illegal acts.

The Court of Appeals has taken the liberty to ignore the intent of the Legislature and interpretation of the Act as interpreted by the Indiana decisions. If the Act intends what it says and if the Indiana decisions are correct in interpreting the Indiana Act, then obviously the District Court was correct and the Court of Appeals was wrong.

The Court of Appeals held that the fact that Respondent was not licensed on July 8, 1959 when the Listing Contract was entered into does not, itself, render the contract void, and does not preclude recovery. This holding was in spite of the wording of the Indiana Licensing Act and in spite of the Indiana decisions which held that contracts made in violation of the statute are void.

The Court of Appeals reversed and remanded for further proceedings the District Court's decision, which reversal and remanding were unnecessary if the Indiana decisions are followed, that contracts made in violation of a statute are void. This was obviously so in this case.

Conclusion.

Petitioners reaffirm that under Rule No. 19 also, the Seventh Circuit Court of Appeals has decided an important State question in a way in conflict with applicable State law.

WHEREFORE, Petitioners respectfully pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JUSTIN WAITKUS,
Counsel for Petitioners.

JUSTIN WAITKUS,
Counsel for Petitioners,
569 Broadway,
Gary, Indiana.